Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-243

ALLIED CHEMICAL CORPORATION, E. I. du PONT de NEMOURS AND COMPANY, KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., PENNWALT CORPORATION, RACON INCORPORATED, UNION CARBIDE CORPORATION,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The respondent, Daiflon, Inc., submits its brief in opposition to the petition of Allied Chemical Corporation, E.I. du Pont de Nemours and Company, Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon Incorporated,

and Union Carbide Corporation that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

QUESTION PRESENTED

Whether the court of appeals' determination that the trial court erred in disallowing the use of Rule 33(c) F.R.Civ.P. in response to an interrogatory requesting respondent's costs of operation, and in imposing the sanction of dismissal, conflicts with this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.* ___ U.S. ___, 96 S.Ct. 2778 (1976).

STATEMENT

The following statement of the case is respectfully presented by the respondent, Daiflon, Inc., pursuant to Rule 40 of the Rules of this Court. The statement is intended to provide an accurate and complete history of the proceedings in the trial court which directly relate to the question presented, together with a summary of the action taken on appeal by the Court of Appeals for the Tenth Circuit.

A. The Interrogatory

On July 27, 1973, petitioners served their second set of interrogatories upon Daiflon. Interrogatory No. 2, which ultimately precipitated the trial court's dismissal of this antitrust action with prejudice pursuant to Rule 37(b) (2) (C) F.R.Civ.P., reads as follows:

"With respect to each individual item of refrigerant gas identified in the answer of Interrogatory No. 1, state your direct material cost, direct cost of production, overhead cost of production, selling expense, and general and administrative expense per pound prepaid freight to (1) Houston, Texas; (2) Oklahoma City, Oklahoma; (3) Kansas City, Missouri; (4) Minneapolis, Minnesota as of the first of each calendar month of plaintiff's operations."
(R. Vol. III, p. 545).

The individual items of refrigerant gas identified by Daiflon in its answer to Interrogatory No. 1 are: refrigerant gas grade "R-11" in 25, 50, 100, and 200 pound cylinders; 'R-12" in 25, 50, 100, 145 and 1,000 pound cylinders; "R-22" in 25, 50, 100, 125 and 1,000 pound cylinders; and "R-13" in 250 pound cylinders.

B. Proceedings Before The District Court Prior To Dismissal

In September of 1973, pursuant to informal request made by petitioners, Daiflon shipped from Galveston, Texas, to Tulsa, Oklahoma, all books and records relating to corporate operations during the entire period of its existence (1969-1972). The documents were delivered to counsel for petitioner, Allied Chemical Corporation, where they have been maintained for petitioners' continued inspection and copying.

Daiflon initially responded to petitioners' second set of interrogatories on September 24, 1973. For its response to Interrogatory No. 2, Daiflon stated that it would require

sixty (60) days from the date of petitioners' return of its books and records to prepare an appropriate answer. (*Id.* at 609). Petitioners did not seek to compel a further response from Daiflon with respect to that interrogatory. On October 5, 1973, during the deposition of Daiflon's president, Richard E. Carter, and with the corporate documents still within the custody of petitioners, Daiflon amended its answer to Interrogatory No. 2 by exercising its option under Rule 33(c) F.R.Civ.P. (*Id.* at 655). Two weeks later petitioners filed a motion to compel a further answer to the interrogatory. (*Id.* at 677). Daiflon responded to the motion to compel citing authorities in support of its use of Rule 33(c), and attached to its response an affidavit by Carter. In the affidavit Carter stated that he would, upon request by petitioners' counsel, "segregate those books and records from which the information requested by Interrogatory No. 2 can be derived". (*Id.* at 720).

At a hearing before the trial court on November 26, 1973, an order was entered granting the motion to compel, and directing the filing of answers within sixty (60) days. The trial judge stated that it would not be necessary for Daiflon to provide its cost information in accordance with the specific format required by petitioners' interrogatory; rather, it was permitted to "just give these costs in your own manner, that of any qualified CPA". (R. Vol. XII, Nov. 26, 1973, Trans. p. 4).

Within the time period provided by the trial judge, Daiflon served upon petitioners an answer to Interrogatory No. 2 which consisted of an accounting statement prepared by its certified public accountant, James R. Robertson, containing average per pound costs associated with the distribution of its products for the eight-month period ending October 31, 1971. The answer was accompanied by affidavit of Daiflon's counsel stating that the information provided was representative of Daiflon's costs for the years 1970, 1971 and 1972. (R. Vol. IV, p. 748). Petitioners moved to compel further answers, which motion was granted by the court February 21, 1974. Daiflon was granted sixty (60) additional days to file answers. (*Id.* at 834). Prior to the conclusion of the sixty-day period Daiflon filed a motion and obtained an order providing for an additional ten (10) days to file its answers. (*Id.* at 837, 840).

One day before the expiration of the time period established by the trial court, Daiflon filed its final answer to Interrogatory No. 2. The answer, prepared by Robertson, contained the following information for each year of Daiflon's operation: (1) gross sales; (2) cost of goods sold — including purchases, importer's fees, customs, duty charges and freight; (3) plant expenses including salaries, payroll taxes, maintenance and repairs, rent, auto expense, utilities, depreciation and miscellaneous expenses. Robertson's computations were made on a per pound basis for

each grade of refrigerant gas marketed by Daiflon. (*Id.* at 841). Petitioners thereupon filed a motion to dismiss the action pursuant to Rule 37(b) (2) (c) F.R.Civ.P. (*Id.* at 846). The motion was predicated upon the following alleged deficiencies in Daiflon's answer:

> "*First*, the financial information provided in the response is given only for each year of plaintiff's business, rather than for each month as requested. *Second*, the information is supplied only for the types of refrigerant gas handled by plaintiff, not for each cylinder size as requested. *Third*, and most importantly, the response fails to supply complete figures reflecting the general and administrative costs plaintiff incurred in its production (*i.e.*, importation and repackaging) of refrigerant gas and provides no figures *whatever* regarding plaintiff's costs to distribute its products." (*Id.* at 850).

Daiflon filed a response to the motion to dismiss and attached an affidavit prepared by Robertson. (*Id.* at 862-870). Robertson stated that Daiflon's accounting methods do not permit the presentation of cost information on a monthly basis due to the fact that costs and expenses were not accrued at the end of each month, and inventories were taken only at the end of each year or as required by audits. Robertson further stated that the books do not contain information from which an allocation of costs associated with cylinder size can be made; that costs of distribution with respect to each grade of gas marketed by Daiflon varied based upon type of sale and the books

contain no analysis with respect to sales which were FOB plant, FOB destination, prepaid, or freight allowed; that deposits on steel cylinders, amortization of steel cylinder inventories and deposits in excess of costs are not expense items but merely reflect profits made on deposits on containers which were not returned; that Daiflon's books do not contain a breakdown of sale expense on a per pound basis nor do they contain a schedule showing sales made by each salesman; that general administrative expenses are not assignable to cylinder size or grade of gas; and that interest and banking charges on letters of credit are a fluctuating expense and not assignable to refrigerant grade or cylinder size. (*Id.* at 870-872).

C. The Order of Dismissal And Subsequent Proceedings In The District Court

Following the filing by petitioners of a reply memorandum to Daiflon's response to the dismissal motion (*Id.* at 884), the trial court, *without a prior hearing*, entered an order dismissing the action with prejudice. The court concluded that Daiflon's final answer "failed to comply with the order of the court and fails to provide essential information critical to the determination of whether or not plaintiff is entitled to recover damages". (*Id.* at 888). The order did not contain a finding of "willful disregard" of the court's prior order or bad faith on the part of Daiflon or its counsel.

Daiflon thereafter filed a motion to reinstate the action,

and upon a hearing of the motion presented the testimony of Robertson. (*Id.* at 890-908; R. Vol. XIII, Nov. 26, 1974, Trans.). At the hearing Robertson testified that, with the assistance of a bookkeeper and other supporting personnel, he had worked for appxoimately six (6) weeks in preparing Daiflon's final answer. (R. Vol. XIII, Nov. 26, 1974, Trans. p. 10). Robertson testified as to the procedures followed in preparing the answers, described Daiflon's bookkeeping and accounting methods, further explained statements made in his affidavit and responded to cross-examination. Significantly, he stated that any qualified CPA, furnished with the same books and records which he possessed in order to prepare his answer, could assemble the same data as that set forth in his answer. (*Id.* at 18). Petitioners presented no evidence at the hearing.

Following the presentation of evidence at the hearing on the motion to reinstate, the trial judge indicated his disappointment at the fact that Daiflon had not, following entry of the order of dismissal, supplemented its answers:

> "It was my feeling and hope that after the court had entered the order of dismissal the plaintiff would get busy and file the answer, Interrogatory No. 2, fully, completely and in good faith." (*Id.* at 70).

The motion to reinstate was denied two (2) weeks following the hearing, with the trial court stating that Daiflon's testimony did not establish justification "for the failure to

provide an adequate answer to defendants' Interrogatory No. 2", and that Daiflon was "grossly negligent" in failing to file a proper answer to the interrogatory. (R. Vol. IV, p. 955).

D. Judgment Of The Court Of Appeals

The Court of Appeals for the Tenth Circuit reversed the trial court's order of dismissal upon the ground that the trial court erred in refusing to permit Daiflon's exercise of the option provided by Rule 33(c) to answer the interrogatory. The case was remanded to the trial court to allow Daiflon to supplement its first amended answer with a list of books and records from which the answer to the interrogatory could be derived. *Daiflon v. Allied Chemical Corporation, et al.*, 534 F.2d. 221 (10th Cir. 1976).

ARGUMENT

The petition for a writ of certiorari is based upon the premise that the opinion of the Court of Appeals for the Tenth Circuit conflicts with this Court's subsequent decision in *National Hockey League, supra.* Petitioners contend that the opinion of the court of appeals in this case reflects the same failure to recognize trial court discretion in consideration of a motion to dismiss under Rule 37 as that evidenced by the action of the Third Circuit in *National Hockey League.* Whether that proposition is valid depends upon an examination of the specific issues of fact and law presented to the district courts in each case.

That analysis, which is conspicuously lacking in the petition for a writ of certiorari, discloses (1) a vast dissimilarity of historical facts regarding the efforts of the respective plaintiffs in complying with Rule 33 responsibilities, and (2) no inconsistency or conflict between this Court's opinion in *National Hockey League* and that of the Court of Appeals for the Tenth Circuit in this case.

The district court's order of dismissal in the hockey litigation occurred during the pendency of the motion to dismiss in this case, and was specially brought to the trial court's attention by petitioners' counsel. Nevertheless, it was not cited as authority by the trial judge in his dismissal order. (R. Vol. III, pp. 888-889). Moreover, while the Third Circuit's reversal of the judgment of the district court occurred during the consideration of this appeal by the Tenth Circuit, that opinion was not relied upon by the court of appeals. Both the district court and appeals court in this case apparently recognized that while the hockey litigation did involve the broad issue of dismissal under Rule 37 for failure to comply with an order for discovery, the unusual facts involved in that case (including plaintiffs' repeated failures to comply with filing deadlines) diminished its relevancy to the issues presented herein.

In *National Hockey League* the subject interrogatories were served upon plaintiff in February of 1973. Plaintiffs first moved for an extension of time to answer the interrogatories on May 4, 1973. The district court granted

an extention to May 14 to object to certain interrogatories and to May 25 to answer others. Plaintiffs thereafter broadly objected to some interrogatories on May 15 and filed wholly insufficient answers to others on May 25. At a pre-trial conference on February 22, 1974, plaintiffs' counsel advised the court that plaintiffs had the information which would permit a response to the interrogatories and would provide answers by March 11, 1974. However, neither answers to the interrogatories nor a motion for an extension of time to so answer were filed by the promised date, although plaintiffs wrote a letter to the court requesting an extension to March 18. Defendants thereupon moved to dismiss the action, which was denied by the court with strong warnings to plaintiffs' counsel. Answers to some, but not all, of the interrogatories were filed March 18. The answers which were filed with respect to interrogatories relating to damages were substantially comprised of "general form language". *In re Professional Hockey Antitrust Litigation,* 63 F.R.D. 641, 651 (E.D.Pa. 1974). Numerous other answers were characterized by the district court as being wholly inadequate, insufficient and evasive. (*Id.* pp. 650-654). The answers reflected a

> "tendency to circumvent giving a specific answer by offering a broad conclusionary answer to several subparagraphs and thus not answering each particular aspect of the question". (*Id.* 654).

On April 12, 1974 the district court ordered plaintiff

to supplement some answers by April 29 and directed answers to the damage nterrogatories by June 14. In its order compelling additional answers the court forewarned plaintiffs "that the court will be amenable to entertaining any motions under Fed.R.Civ.P. 37 should such information not be forthcoming by June 14, 1974." (*Id.* 650). Thereafter, on April 24, one of plaintiffs' attorneys wrote a letter to the court seeking an extension of time from April 29 to May 8 because the Court Clerk was unable to immediately xerox "hundreds of documents suddenly requested by plaintiffs". (*Id.* 650). On April 29 the court reluctantly granted an extension until May 6 for answers to those interrogatories. The plaintiffs timely filed answers to interrogatories due on that date, and included answers to certain of the damage interrogatories which were to be filed by June 14. However, despite the court's unambiguous warning of April 12, no additional answers were filed by plaintiff on June 14. A full week later plaintiffs filed a motion to amend the prior pre-trial order by extending the time to answer the damage interrogatories to July 25, 1974. Defendants' motion to dismiss followed.

The district court, upon a comprehensive review of the plaintiffs' repeated failures to comply with discovery orders, dismissed the action with prejudice:

> "After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admoni-

> tions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.*, June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied."

A divided Court of Appeals for the Third Circuit reversed the district court on the basis that insufficient evidence existed to support a finding that plaintiffs' failure to file supplemental answers by June 14, 1974, "was in flagrant bad faith, willful or intentional." On petition for a writ of certiorari this Court held that the Third Circuit erred in substituting its judgment for that of the trial court in determining the Rule 37 motion:

> "*Under the circumstances of this case* we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case

> by reason of respondents' 'flagrant bad faith' and counsel's 'callous disregard' of their responsibilities." *National Hockey League, supra.* 96 S.Ct. at 2781. (emphasis added)

Unlike the plaintiffs in the hockey litigation, Daiflon has not established a record of failing to file Rule 33 responses or extension motions within the time directed by the trial court. Moreover, it is important to note that the district court, in dismissing Daiflon's action, did not find either "flagrant bad faith" or a "callous disregard of responsibilities" owed to the court. The two-page order of dismissal states that Daiflon's final answer to Interrogatory No. 2 is "totally inadequate" and "fails to comply with the order of the court and fails to provide essential information critical to the determination of whether or not plaintiff is entitled to recover damages." (R. Vol. III, pp. 888-889).

In reviewing the trial court's order of dismissal the court of appeals considered Daiflon's argument that the trial court initially erred in compelling answers beyond its first amended answer to Interrogatory No. 2 wherein it exercised its option under 33(c) to produce books and records from which the answer could be derived. The Tenth Circuit, noting that the record on appeal contained no statement pertaining to the basis for the trial court's decision to compel a further answer to Interrogatory No. 2, concluded that petitioners did not satisfy the burden of proving that Daiflon's exercise of the Rule 33(c) option was incomplete:

> ". . . appellees point to no evidence recognizable in this court to support a determination that a substantial difference in the burden of compiling the answer existed. *Daiflon v. Allied Chemical Corporation, supra.* 534 F.2d 221, 227.

Petitioners aver that the appeals court erred in holding that the burden of deriving or ascertaining the answer to the interragotory was substantially the same for them as for Daiflon. Petitioners refer to "undisputed excerpts" of the deposition testimony of Carter, Daiflon's president, that he could prepare an answer to Interrogatory No. 2 more easily than petitioners. The court of appeals disposed of this contention on the ground that the deposition of Carter had not been filed with the trial court as required by Rule 30(f) F.R.Civ.P. and had been brought to the trial judge's attention through briefs of counsel and oral argument. The court properly noted that it could not consider depositions not filed in the district court in determining the appeal, and that statements of counsel in appellate briefs generally are not part of the record. *Daiflon v. Allied Chemical Corporation, et al., supra.,* at pp. 226-227; *United States v. Gazda,* 499 F.2d 161 (3rd Cir. 1974); *Dictograph Products Company v. Sonotone Corp.,* 231 F.2d 867 (2nd Cir. 1956), appeal dismissed, 352 U.S. 883, 77 S.Ct. 104, 1 L.Ed.2d 82 (1956).

Assuming, *arguendo*, that the court of appeals erred by failing to consider testimony from the unfiled deposition, Daiflon submits that the particular statements upon which petitioners rely were taken from their proper context. The testimony of Carter was only that he knew the location within Daiflon's boxed books and records of those documents which would have to be examined to answer the interrogatory. He testified that:

> "A. ***In essence, any accountant would have to do exactly the same job that I would have to do to do this; because I do know what boxes to take out of —
>
> Q. (interposing) You know what documents to look for in the beginning of the task of deriving this information, I take it?
>
> A. It would be easier for me because I know where the boxes are, the locations are for each item within there, yes, sir." (R. Vol. III, pp. 685-686).

As noted earlier, Carter executed an affidavit which was attached to Daiflon's response to petitioners' first motion to compel wherein he stated that, upon request by counsel for petitioners, he would segregate the books and records from which the information requested by the interrogatory could be derived.* (R. Vol. III, p. 720).

*Although petitioners have had unrestricted access to Daiflon's books and records since September of 1973, not once have they represented, either by brief, affidavit or oral argument, that they would encounter any difficulty in compiling the data required by the interrogatory. Nevertheless, they have steadfastly opposed, albeit with unmistakable success in the trial court, the utilization of Rule 33(c).

This Court's opinion in *National Hockey League*, which was clearly limited to "the circumstances of (that) case", does not purport to limit the clear power of the appeals court to reverse an order of dismissal which rests upon an improper application of Rule 33(c) F.R.Civ.P. That decision only involved the failure of the appeals court, acting upon a record which chronicles the most aggravated violation of discovery rules and court orders, to afford proper respect to the discretionary rulings of the district court in applying the provisions of Rule 37(b) (2) (C).

The court of appeals here, unlike the Third Circuit, did not base its reversal of the trial court upon the existence of "extenuating circumstances" in the record.** Rather, the court found that the trial judge committed fundamental error in failing to properly apply the standards of Rule 33. The court's decision was mandated by the fact that the record was devoid of any evidence which tended to support petitioners' claim that it would be more difficult for them to answer the interrogatory than Daiflon.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing that there are special and important reasons why the writ should be

**"The Court of Appeals did not question any of the findings of historical fact which had been made by the District Court, but simply concluded that there was in the record evidence of 'extenuating circumstances'." *National Hockey League, supra.*, 96 S.Ct. at 2780

granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the court of appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another court of appeals. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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